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COMMISSION ON JUDICIAL PERFORMANCE
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REPORT CONCERNING ADOPTION ON MAY 8, 2013 OF ADDITIONS AND AMENDMENTS TO RULES OF THE COMMISSION ON JUDICIAL PERFORMANCE

Pursuant to its rulemaking authority under article VI, section 18, subdivision (i) of the California Constitution, on January 15, 2013, the Commission on Judicial Performance circulated for public comment a set of proposals for additions and changes to certain of its rules. Following consideration of the comments received, the commission adopted the proposed rule amendments, with some modifications, at its meeting on May 8, 2013, as summarized below. The text of each addition and amendment is attached and the final version of the amended rules may be found on the commission's website at http://cjp.ca.gov.

I. EXPLANATION OF ADDITIONS AND AMENDMENTS AND DISCUSSION OF PUBLIC COMMENTS

A. Amendments to Rules 110 and 111 – Including Specificity of Allegations in Staff Inquiry and Preliminary Investigation Letters

Explanation of Amendments

The commission currently informs the judge of the specifics of the allegation(s) in staff inquiry and preliminary investigation letters and offers the judge an opportunity to respond as stated in policy declarations 1.3 and 1.5. The letters summarize the alleged conduct and, if applicable, statements made by and to the judge. To the extent possible, the judge is informed of the date and location of the alleged conduct and, if applicable, the name of the court proceeding. The amendments to rules 110 and 111 incorporate this practice into the commission's rules.

These amendments were adopted after consideration of proposals submitted by the California Judges Association (CJA) seeking full discovery during the commission's investigation. CJA's proposed rule would require the commission to disclose to the judge the complaint, the identity of all witnesses, including the complainant, and all witness statements and documents relied on by the commission during the commission's investigation. The commission discloses the information requested by CJA when formal charges are filed, which occurs in approximately one to four cases a year. CJA's proposal would result in disclosure in potentially all cases that are investigated by the commission, approximately 100 cases per year.

CJA's proposed rule was not adopted because the commission believes eliminating confidentiality of complainants and witnesses would severely compromise the commission's investigation of complaints of judicial misconduct and would jeopardize protection of the public. The commission's practice, as reflected in the amendments to rules 110 and 111, is consistent with the majority of state judicial disciplinary commissions in the country. Only one state – Alabama – requires the discovery requested by CJA *before* a formal charge is filed in judicial disciplinary proceedings. When Alabama amended its rules in 2001 to require disclosure of the identity of complainants, among other things, complaints dropped almost by half.[1] An American Bar Association report (ABA report) concluded that Alabama's procedures "conflict with national practice and are not protective of the public. They unduly burden the system, deter the filing of valid complaints, and compromise the ability of the Commission to effectively conduct a proper investigation." [2]

Whistleblowers filing complaints regarding improper governmental activity – including improper activity by judges in the courts – are guaranteed protection, including confidentiality, under California's Whistleblower Protection Act.[3] Consistent with whistleblower laws, the commission's rules protect the confidentiality of those who report judicial misconduct. The amendments to rules 110 and 111 ensure that judges are able to effectively respond to allegations of judicial misconduct while at the same time ensuring that the commission fulfills its mandate to protect the public and effectively investigate complaints of judicial misconduct.

Comments

Four comments were received. In addition to commenting on the commission's proposed rule amendments, the comments address CJA's proposed rule.

Golden Gate University School of Law Dean Emeritus Peter Keane and Professor Susan Rutberg submitted comments in favor of the adoption of the amendments proposed by the commission and in opposition to CJA's proposed discovery rule. Professor Keane was the

[1] American Bar Association Standing Committee on Professional Discipline, Alabama: Report on the Judicial Discipline System (March 2009) (hereafter ABA report), p. 14.

[2] ABA report at p. 17. In addition to the discovery provisions discussed in this report, Alabama's amended rules require verification of complaints.

[3] Gov. Code, §§ 8547.5, 8547.6, 8547.7, subdivision (c).

author of Proposition 190, which made numerous significant changes to the commission, including changing the composition of the commission to a majority of public members and opening formal proceedings to the public. Proposition 190 was adopted by both houses of the California legislature and overwhelmingly approved by the voters in 1995. Professor Rutberg teaches Ethics in Criminal Justice, among other courses, and directs the law school's externship clinical programs. Professors Keane and Rutberg express great concern that CJA's proposal would have "an enormously chilling effect on the filing of good faith complaints by employees who staff the courts and/or lawyers who regularly appear before the same judges." Professors Keane and Rutberg state that whether "judges would actually engage in retaliatory behavior toward those who initiated complaints against them or not, is not the point: the fear of retaliation is sufficient to gut the effectiveness of the complaint system currently in place." They believe the commission's proposal "is a much better way to protect judges' rights to due process of the law and the public's right to the fair administration of justice." In conclusion, they state, "California voters overwhelmingly approved public participation in the judicial oversight process when it passed Proposition 190 eighteen years ago. Now is not the time to go backward."

The California Federation of Interpreters (CFI), a labor union and professional organization that represents court interpreters throughout the state, submitted comments in favor of the commission's proposed amendments and in opposition to CJA's proposed discovery rule. CFI states that the commission's proposal "strikes the right balance between two important interests during the investigation of a complaint: 1) providing specific information about allegations sufficient for a judge to respond and provide factual information; and 2) protecting the public by preserving the effectiveness of the complaint and investigation process and ensuring confidentiality to those who report misconduct." CFI believes that CJA's proposal would have a chilling effect on the filing of complaints and witness cooperation with the commission's investigation. CFI expresses concern that those who work closely with a judge "are vulnerable to potential retaliation or intimidation" and would be much less likely to come forward and report issues of concern.

AFSCME District Council 57, representing California court employees in a number of counties, submitted comments in favor of the commission's proposed amendments and in opposition to CJA's proposed discovery rule. The comments state that the commission's proposed amendments are "fair, appropriate and in conformance with the rights accorded most other public employees in the investigation phase of any complaint." Further, AFSCME states, "To extend to judges more disclosure at this phase of the complaint process would – as doubtless has been the reasoning in limiting disclosure to other public employees in similar proceedings – chill the process of bringing to light matters which warrant investigation, and in this instance would likely silence complaints by employees whose livelihood depends on the Court." AFSCME points out that CJA's proposal would "extend to judges a set of rights not enjoyed by the vast majority of public employees," since disclosure of witness names and other documents have traditionally been available to public employees only when concrete action is proposed by the employer.

CJA submitted comments urging the commission, in lieu of the amendments to rules 110 and 111, to adopt its proposed rule – providing full discovery before a judge responds to a staff inquiry or preliminary investigation letter, including the "sources" upon which the

commission is relying in opening the investigation, witness interviews, documents, and sealed and confidential records and transcripts. CJA states that "judges should be entitled to adequate notice of the allegations being made against them before they are asked to respond to those allegations. Merely knowing the nature of the charge is not enough."

Under the commission's amended rules, which incorporate the commission's long-standing practice described in the commission's policy declarations 1.3 and 1.5, the judge is informed of far more than the "nature of the charge" before being asked to respond. Staff inquiry and preliminary investigation letters sent to the judge describe the alleged conduct with as much detail as possible without disclosing the identity of the complainant or witnesses. The judge is informed of the date and location of the alleged conduct, if known to the commission. When applicable, the judge is informed of the name of the court case during which the alleged conduct occurred. If the investigation concerns statements made by or to the judge, the letter to the judge includes the text or summaries of the comments, and, if a transcript is available to the commission, pertinent quotes and citations to the transcript are included. In the commission's view, this degree of specificity provides the judge with adequate notice to be able to effectively respond to the allegations.

The California Supreme Court has upheld the commission's confidentiality protections and discovery rules, finding that they satisfy due process requirements.[4] There has never been a finding of fundamental unfairness in the commission's proceedings.

CJA disputes that disclosure of the identity of the complainant and witnesses would have a chilling effect on the filing of complaints or witness cooperation during the commission's investigation. Pointing out that its proposed rule would allow the commission to withhold the name and interview dates of the witnesses in "extraordinary circumstances," CJA suggests that there is no danger of witness intimidation. In the commission's view, regardless of whether there is an actual threat of intimidation, the fear of retaliation would deter the reporting of judicial misconduct and witness cooperation.

CJA attributes the drop in complaints in Alabama after its rules changed to the addition of a requirement that all complaints be verified, rather than to the discovery provisions.[5] The ABA report did not so conclude. Rather, the ABA report specifically states that Alabama's discovery rule, "particularly the revelation of the complainant's identity, has a chilling effect on those who may want to file a complaint against a judge."[6] Further, the ABA report states, "Data for 1996 through 2008 indicate that the number of complaints filed with the Commission dropped significantly after 2001 when complaints had to be verified *and judges were given the*

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[4] *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371; *Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 526-529.

[5] In 2000, 279 complaints were filed. The following are the number of complaints filed after Alabama's adoption of the new rules: 2001-176, 2002-141, 2003-112, 2004-167, 2005-171, 2006-161, 2007-167, 2008-159. (ABA report at p. 14.)

[6] ABA report at p. 19.

names of complainants." [7] (Italics added.) Thus, the decrease in complaints appears to be attributable to both the verification requirement and the requirement that the complaint and other discovery be provided to the judge during the investigation.[8]

CJA distinguishes its proposal, which would require full discovery before the judge responds to a staff inquiry or preliminary investigation letter, from Alabama's rule, which requires full discovery within 21 days of receiving the complaint. In the commission's view, this distinction bears no significance to the concerns expressed in the ABA report about the chilling effect of disclosing the source of the complaint and witness statements. The chilling effect results from the knowledge that the source will likely be disclosed to the judge, regardless of the precise timing of the disclosure. This is particularly true for individuals closely affiliated with the court – court employees, judges and lawyers – whose complaints are frequently found to be more meritorious than others.

CJA contends Alabama is not alone in "opening its files to the accused judge" prior to formal proceedings. This is not so. No other state besides Alabama provides discovery to the extent proposed by CJA or "opens its files" to the accused judge before formal charges are filed. The minority of states referred to by CJA provide the judge with either the complaint or the identity of the complainant prior to a response by the judge, but do not provide the full discovery requested by CJA prior to the formal charges. Moreover, some of those states have provisions which allow the commission to withhold the complaint under certain circumstances, such as

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[7] ABA report at p. 14.

[8] Contrary to the conclusions in the ABA report, CJA suggests that the number of complaints actually increased dramatically in Alabama after the rules were amended to require verification and disclosure. The ABA report includes a table listing the number of "complaints received" from 1996 to 2008, which indicates that 279 complaints were received in 2000, compared to 159 complaints received in 2008. (ABA report, p. 14.) The report also states that in 2008 the commission received 888 "unverified complaints and inquiries" upon which it took no action. (*Ibid.*) CJA adds the 888 figure to the 159 complaints received in 2008 to conclude that a total of 1,047 verified and unverified complaints were received in 2008, compared to the 279 complaints received in 2000. This conjecture is incorrect. According to Jenny Garrett, the director of the Alabama Judicial Inquiry Commission, the 888 figure included in CJA's calculations of complaints received refers to "complaint inquiries." "Complaint inquiries" include phone inquiries and written inquiries not followed by a verified complaint. Ms. Garrett provided statistics that show that both "complaint inquiries" and verified "complaints received" decreased after the rule changes. Further, the ABA's conclusions that complaints received decreased after the rule changes are corroborated by Ms. Garrett's expanded report showing that the averages of the complaints and investigations during the eight years prior to the amendments as compared to those of the eight years since the amendments are as follows: average number of complaints filed per year decreased from 233 to 155 per year; investigations decreased from 50 to 30 per year. (Ms. Garrett's report is available for inspection in the commission's public 2012 biennial rules review file.)

when the complainant is a court employee or the commission believes the judge may retaliate, or when the complainant so requests.

CJA questions why providing discovery during the investigation would impede the commission's ability to protect the public and pursue the truth when discovery is provided once formal charges are filed. Formal proceedings are instituted in approximately one to four cases a year, as compared to over one hundred cases a year in which the commission authorizes a staff inquiry or preliminary investigation. Currently, complainants and witnesses are informed that their statement would be provided to the judge in the event that formal proceedings are instituted, but are also told that most cases are resolved without formal charges. Under CJA's proposal, complaints and witness statements would be released in most staff inquiries and preliminary investigations. Thus, if CJA's proposal were adopted, complainants and witnesses would have to be informed that their statement will most likely be turned over to the judge. Also, as discussed by the Supreme Court in *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371, the level of procedural safeguards required depends on a weighing of private and governmental interests involved. The commission's interest in effectively investigating complaints of judicial misconduct and protecting the public must be weighed against the potential impairment to the judge's career from the commission's action. When the judge is facing the possibility of censure or removal during formal proceedings, greater procedural protections are warranted, whereas the judge's interest in avoiding a relatively mild form of discipline does not justify the full panoply of rights associated with formal proceedings, including full discovery.[9]

In response to the commission's concern that CJA's proposal would impose a significant burden on commission investigations and delay the investigations, CJA offered to amend its proposal to provide that judges would be given access to all materials to copy at their own expense. This amendment would have little impact on the burden and cost to the commission of providing full discovery during its investigations. Staff would still have to spend a considerable amount of time gathering and copying the discovery, separating unresponsive materials, removing privileged or otherwise protected documents, and preparing a list of documents turned over. Moreover, CJA's proposal would require the commission to supplement discovery when new information is received and provide the judge with an additional 20 days to respond each time the commission furnishes additional discovery, causing considerable delay in the process.

For the foregoing reasons, the commission believes the proposed amendments to rules 110 and 111 ensure that judges receive sufficient information to effectively respond to a commission investigation while also ensuring that the commission complies with its mandate to efficiently and effectively investigate complaints of judicial misconduct and to protect the public.

[9] See *Oberholzer v. Commission on Judicial Performance, supra*, 20 Cal.4th at pp. 392-394.

B. New Rule 111.4 – Legal Error Standard

Explanation of New Rule

New rule 111.4 states the standard for the imposition of discipline based on legal error, which in addition constitutes judicial misconduct. This is the standard set by the California Supreme Court in *Oberholzer v. Commission on Judicial Performance* (1999) 20 Cal.4th 371. While the commission has applied this standard since the *Oberholzer* decision was issued, new rule 111.4 serves to ensure that the judiciary, and the public is fully informed of the standard.

The new rule states that discipline will not be imposed for legal error unless the legal error reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty (*Oberholzer* "plus" factors).

Discussion of Comments

Two comments were received – from CJA and San Joaquin County Superior Court Judge Terrence Van Oss.

Both comments object to the commission's proposed rule as not going far enough in limiting the commission's authority to issue discipline based on legal error. CJA proposes that the commission include two elements in its rule which are not included in the legal error standard set by the Supreme Court: (1) a requirement that there be extrinsic evidence of one of the *Oberholzer* "plus" factors, and (2) evidence that the judge acted for an improper purpose. Judge Van Oss urges the commission to adopt CJA's proposal and require evidence of bad faith.

The commission concluded that CJA's proposal would be a significant departure from the legal error standard set by the Supreme Court and would unduly restrict the commission's authority to discipline for legally erroneous decisions that also constitute judicial misconduct under *Oberholzer*. As CJA acknowledges, reference to a requirement of "extrinsic evidence" is taken from a concurring opinion in *Oberholzer*. It is defined as evidence apart from the nature of the ruling itself. The majority opinion did not adopt that requirement in setting a legal error standard. In some cases, the ruling itself manifests clear and convincing evidence of one of the *Oberholzer* "plus" factors.

CJA also contends that discipline should not be imposed for legal error, even legal error involving one of the *Oberholzer* "plus" factors, unless the commission can prove the judge acted in bad faith or for an improper motive. According to CJA, "Each of the factors enunciated in *Oberholzer* involve an improper motive." This is not the case. There are circumstances in which a judge commits legal error which in addition constitutes misconduct under *Oberholzer* without evidence of bad faith or acting for an improper purpose.

For example, in 2004, Judge Joseph O'Flaherty was publicly admonished for instructing prospective jurors during jury selection that they had permission to lie to get off the jury if they had a racial bias. The commission found that the judge's objective was to root out bias by giving

prospective jurors who might be hesitant to acknowledge racial bias another way to get off the jury. However, the commission rejected the judge's argument that he could not be disciplined based on good faith legal error and concluded the judge was subject to discipline because, by instructing jurors to lie, he abused his authority, disregarded the defendant's fundamental right to a fair and impartial jury, and intentionally disregarded the law. As another example, Judge James Roeder was publicly admonished in 2003 based on his arraignment practice of stating for the record that defendants had waived their right to a speedy preliminary hearing or misdemeanor trial within required time limits without obtaining a waiver from the defendant. While not denying that he knew his practice was contrary to law, the judge explained that he was motivated by a desire to accommodate defense counsel who needed time to investigate cases. Even accepting the judge's good faith motivation, the commission concluded that the judge's arraignment practices were clearly legal error and represented a disregard for the fundamental constitutional and statutory rights of defendants.

Moreover, the Supreme Court has held that "prejudicial conduct," one form of judicial misconduct, includes "conduct which a judge undertakes in good faith but which nevertheless would appear to an objective observer to be not only unjudicial conduct but conduct prejudicial to public esteem for the judicial office." (*Geiler v. Commission on Judicial Performance* (1973) 10 Cal.3d 270, 284.) In *Gubler v. Commission on Judicial Performance* (1984) 37 Cal.3d 27, the Supreme Court determined the judge committed prejudicial misconduct through various attorney fee practices, which included ordering appearances for defendants for the purposes of collecting attorney fees and causing attorney fees orders to be conditions of probation. The court concluded the judge engaged in misconduct despite finding the judge was endeavoring in good faith to serve the public interest as he saw it. In *Kloepfer v. Commission on Judicial Performance* (1989) 49 Cal.3d 826, 851, the Supreme Court determined that a judge's issuance of a bench warrant in violation of the Penal Code – for a defendant who had not been ordered to appear personally – was prejudicial misconduct despite the judge's representation that he reasonably believed he had authority to issue the warrant.

Under CJA's proposed standard, the commission would be precluded from imposing discipline under any of the aforementioned circumstances because there was not clear and convincing extrinsic evidence that the judge acted for an improper purpose.

CJA asserts that the commission issues advisory letters based on legal error alone, yet it has not provided any examples or citations to the commission's annual report summaries to support that assertion. In fact, the commission only imposes discipline based on legal error when there is clear and convincing evidence of one of the *Oberholzer* "plus" factors. The commission recognizes that a judicial decision later determined to be incorrect legally does not in itself constitute judicial misconduct and that "judges must be free not only to make the correct ruling for proper reasons, but also to make an incorrect ruling, believing it to be correct."[10] However, as stated by the Supreme Court, a judge who commits legal error which *in addition* clearly and convincingly reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty

[10] *Oberholzer v. Commission on Judicial Performance, supra,* 20 Cal.4th at p. 398.

engages in misconduct and is subject to investigation and discipline. This standard ensures that judges are not subject to discipline based on mere legal error.

C. Amendments to Rules 114(b) and 116(b) – Procedures for Admission of New Information During the Process of Appearing Before the Commission to Object to a Notice of Intended Public or Private Admonishment

Explanation of Proposed Amendments

These amendments concern the process by which a judge can demand an appearance before the commission to object to a notice of intended public or private admonishment. Upon receipt of a notice of intended admonishment, the judge may accept the admonishment, demand a formal evidentiary hearing, or waive the right to formal proceedings and make an appearance before the commission. An appearance is not an evidentiary hearing. The judge is given the opportunity to present factual information and documents during the preliminary investigation. After an appearance, the commission may close the matter or issue discipline up to the level proposed in the notice of intended admonishment; the level of discipline cannot be increased.

Because an appearance is not an evidentiary hearing, rules 114(b) and 116(b) were amended in 2011 to limit the submission of evidence during the appearance process to new factual information that is material and could not have been discovered with reasonable diligence and offered during the preliminary investigation, or that is offered to correct an error of fact in the notice of intended admonishment. The 2011 amendment also allowed the commission to investigate new information that met the criteria for consideration and thereafter either proceed with the appearance process or withdraw the intended admonishment and proceed with a preliminary investigation.

CJA expressed concern that judges may be deterred from submitting new information that meets the criteria for consideration during the appearance process because they fear the commission might withdraw the notice of intended admonishment and impose a higher level of discipline. In consideration of CJA's concern, the commission amended the rules to eliminate the provisions allowing the commission to withdraw the intended admonishment and proceed with the preliminary investigation in the pending matter. However, the amendment also provides that the commission may commence a new inquiry or investigation if the investigation of the new information discloses evidence of possible other misconduct.

The amendments also add a ground for the introduction of new factual information – when the commission determines that consideration of the information is necessary to prevent a miscarriage of justice. Although the commission is of the view that the appropriate time to submit information to the commission is during the preliminary investigation, this proposed amendment would allow the commission to consider information that does not meet other criteria for consideration during the appearance process in those rare instances where failure to consider the information would result in a miscarriage of justice.

Discussion of Comments

CJA submitted the only comment concerning these amendments. CJA has no objection to the amendments and supports their adoption.

D. Amendment to Rule 119.5 – Providing for Electronic and Facsimile Filing and Service of Briefs and Papers During Formal Proceedings

Explanation of Amendment

Electronic filing of briefs and papers has become an increasingly common practice in courts. For the convenience of the parties and the special masters, Rule 119.5 concerning filing with the commission during formal proceedings was amended in order to provide for electronic and facsimile filing and service of briefs and papers, subject to certain specified conditions. Those conditions include that the original document be delivered to the commission office within five calendar days.

The adopted version was modified slightly from the interim amendment that was included in the invitation to comment. The commission's electronic address for filings in formal proceedings was added to subdivision (c). Also, subdivision (f) was modified to add a provision requiring documents that are served by electronic means or by facsimile on the parties and the special masters to be submitted to the commission office at the same time by the same means. The latter provision was added to avoid having the special masters receive and take action on a motion or request before it has been filed with the commission.

Discussion of Comments

No comments were received.

E. Amendment to rule 122(g)(2) – Eliminating the Sunset Clause that Expired on December 31, 2012

Explanation of Comments

At its December 2012 meeting, the commission reenacted rule 122(g)(2), providing for a limited number of discovery depositions during formal proceedings, and eliminated the clause stating that its provisions would be operative until December 31, 2012 unless reenacted by the commission.

The purpose of the sunset clause was to give the commission the opportunity to assess the impact of depositions on the formal proceeding process. Four depositions have been conducted since the deposition rule went into effect on January 1, 2008. There have been no reported problems or issues during the four years the rule has been in effect.

Discussion of Comments

No comments were received.

II. TEXT OF AMENDED RULES

Deleted language is printed in ~~strikeout type~~ and new language is printed in *italic type*.

ADDITION OF SUBDIVISION (b) TO RULES 110 AND 111[11]

Rule 110. Staff Inquiry; Advisory Letter after Staff Inquiry

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(b) (Staff inquiry letter) *A staff inquiry letter shall include specification of the allegations, including, to the extent possible: the date of the conduct; the location where the conduct occurred; and, if applicable, the name(s) of the case(s) or identification of the court proceeding(s) in relation to which the conduct occurred. If the inquiry concerns statements made by or to the judge, the letter shall include the text or summaries of the comments.*

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Rule 111. Preliminary Investigation

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(b) (Preliminary investigation letter) *A preliminary investigation letter shall include specification of the allegations, including, to the extent possible: the date of the conduct; the location where the conduct occurred; and, if applicable, the name(s) of the case(s) or identification of the court proceeding(s) in relation to which the conduct occurred. If the investigation concerns statements made by or to the judge, the letter shall include the text or summaries of the comments.*

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[11] Current subdivisions (b) and (c) in rules 110 and 111 would be designated as subdivisions (c) and (d), respectively.

ADDITION OF NEW RULE 111.4

Rule 111.4. Legal Error

Discipline, including an advisory letter, shall not be imposed for mere legal error without more. However, a judge who commits legal error which, in addition, clearly and convincingly reflects bad faith, bias, abuse of authority, disregard for fundamental rights, intentional disregard of the law, or any purpose other than the faithful discharge of judicial duty is subject to investigation and discipline.

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AMENDMENTS TO RULES 114(b) AND 116(b)

Rule 114. Private Admonishment Procedure

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(b) (Appearance before the commission)

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An appearance before the commission under this rule is not an evidentiary hearing. Factual representations or information, including documents, letters, or witness statements, not previously presented to the commission during the preliminary investigation will not be considered unless it is shown that the new factual information is either: (1) (a) material to the question of whether the judge engaged in misconduct or the appropriate level of discipline, and (b) could not have been discovered and presented to the commission with reasonable diligence during the preliminary investigation, ~~or~~ (2) offered to correct an error of fact in the notice of intended private admonishment, *or (3) necessary to prevent a miscarriage of justice.*

To be considered under this rule, new factual information must be presented at the time the judge submits written objections to the proposed admonishment. When newly presented factual information meets the criteria for consideration under this rule, the commission may investigate the new information *before proceeding with its disposition pursuant to the appearance process. If this investigation discloses information of possible other misconduct, that information will not be considered in the disposition of the pending notice of intended private admonishment but may be the subject of a new staff inquiry or preliminary investigation.* ~~Thereafter, the commission may either proceed with its disposition pursuant to the appearance process as provided in this section or withdraw the intended admonishment and proceed with the preliminary~~

~~investigation. If the commission withdraws the intended admonishment and proceeds with the preliminary investigation, all rights previously waived by the judge shall be reinstated. At the conclusion of preliminary investigation, the commission may close the matter, issue an advisory letter, issue a notice of intended private or public admonishment or institute formal proceedings.~~

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Rule 116. Public Admonishment Procedure

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(b) (Appearance before the commission)

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An appearance before the commission under this rule is not an evidentiary hearing. Factual representations or information, including documents, letters, or witness statements, not previously presented to the commission during the preliminary investigation will not be considered unless it is shown that the new factual information is either: (1) (a) material to the question of whether the judge engaged in misconduct or the appropriate level of discipline, and (b) could not have been discovered and presented to the commission with reasonable diligence during the preliminary investigation, ~~or~~ (2) offered to correct an error of fact in the notice of intended public admonishment, *or (3) necessary to prevent a miscarriage of justice.*

To be considered under this rule, new factual information must be presented at the time the judge submits written objections to the proposed admonishment. When newly presented factual information meets the criteria for consideration under this rule, the commission may investigate the new information *before proceeding with its disposition pursuant to the appearance process. If this investigation discloses information of possible other misconduct, that information will not be considered in the disposition of the pending notice of intended public admonishment but may be the subject of a new staff inquiry or preliminary investigation.* ~~Thereafter, the commission may either proceed with its disposition pursuant to the appearance process as provided in this section or withdraw the intended admonishment and proceed with the preliminary investigation. If the commission withdraws the intended admonishment and proceeds with the preliminary investigation, all rights previously waived by the judge shall be reinstated. At the conclusion of preliminary investigation, the commission may close the matter, issue an advisory letter, issue a notice of intended private or public admonishment or institute formal proceedings.~~

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AMENDMENTS TO RULE 119.5

Rule 119.5. Filing with the Commission During Formal Proceedings

(a) (Procedures for filing) After *the* institution of formal proceedings, all briefs and other papers to be filed with the commission shall be delivered to ~~commission staff at~~ the commission office during regular business hours *by hand delivery or by mail, or electronic or facsimile transmission as provided in this rule,* and shall be accompanied by a proof of service of the document upon the other party or parties, and upon the special masters if they have been appointed in the matter. This includes documents submitted in conjunction with a hearing before the special masters, other than exhibits to be admitted at the hearing. Exhibits admitted at a hearing before the masters shall be transmitted to the commission office pursuant to rule 125.5. A document is filed with the commission when the original is stamped or otherwise marked "filed" with the date. The commission's agent for purposes of filing documents after institution of formal proceedings is the Legal Advisor to Commissioners or the Legal Advisor's designee. A filing may be evidenced by a conformed copy of the cover page of each document submitted for filing.

(b) (Facsimile filing) *Facsimile filing means the transmission of a document by facsimile, directed to the Legal Advisor to Commissioners or the Legal Advisor's designee.*

(c) (Electronic filing) *Electronic filing means the transmission of a document by electronic service to the electronic address of the commission, directed to the Legal Advisor to Commissioners or the Legal Advisor's designee. The electronic address for filing pursuant to these rules is filings@cjp.ca.gov.*

(d) (Conditions for facsimile and electronic filing) *After the institution of formal proceedings, parties or non-parties pursuant to rule 131 may file documents with the commission electronically or by facsimile, subject to the following conditions:*

(1) *Original paper documents, with any required signatures, shall be delivered to the commission office by mail or hand delivery within five calendar days of the facsimile or electronic filing, and shall be accompanied by proof of service.*

(2) *A document transmitted electronically or by facsimile shall be deemed filed on the date received, or the next business day if received on a non-business day or after 5:00 p.m., provided the original paper document is received pursuant to subsection (1) of this subdivision.*

(3) *The document shall be considered filed, for purposes of filing deadlines and the time to respond under these rules, at the time it is received electronically or by facsimile by the commission as set forth in subsection (2) of this subdivision.*

(4) *Upon receipt of a facsimile or electronically filed document, the commission shall promptly send the filer confirmation that the document was received.*

(e) (Signatures) *When the document to be filed requires the signature of any person, the document shall be deemed to have been signed by that person if filed electronically or by facsimile.*

(f) (Electronic and facsimile service*) After the institution of formal proceedings, documents may be served by electronic means or by facsimile on another party, a party's attorney, or the special masters when the party, attorney, or special master has agreed to accept electronic service and/or facsimile service**, provided the documents have been submitted to the commission office at the same time by the same method of service with the original to be submitted in accordance with subdivision (d), subsection (1).*

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AMENDMENT TO RULE 122(g)(2)

Rule 122. Discovery Procedures

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(g) (Depositions)

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(2) (Discovery depositions)

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~~The provisions of subpart (2) of subsection (g) of rule 122 shall take effect January 1, 2008, and shall be operative until December 31, 2012, unless after review, they are reenacted by the commission.~~